INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	3
Argument	10
Conclusion	13

CITATIONS

Cases:

Benes v. *Canary*, 224 F. 2d 470, certiorari denied, 350 U.S. 913	12
Centracchio v. *Garrity*, 198 F. 2d 382, certiorari denied, 344 U.S. 866	12
Chieftain Pontiac Corp. v. *Julian*, 209 F. 2d 657	12
Fried, In re, 161 F. 2d 453, certiorari granted, 331 U.S. 804, certiorari dismissed, 332 U.S. 807	12
Lapides v. *United States*, 215 F. 2d 253	4
United States v. *Shotwell Manufacturing Co.*, 225 F. 2d 394, certiorari granted, 352 U.S. 997	12

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 41	2, 12

In the Supreme Court of the United States

October Term, 1957

No. 523

RAYMOND A. BIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court's opinion, findings of facts and conclusions of law are contained in the order denying the petition to suppress evidence (R. 308a-324a) and are not reported. The opinion of the Court of Appeals (Pet. 15-21) is reported at 246 F. 2d 40.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1957. (Pet. 22.) The petition for a writ of certiorari was filed on October 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether, after a full hearing, the District Court properly denied a pre-indictment petition to suppress evidence which the petitioner claimed he had turned over to the Government for use in his civil and not his criminal tax case.

RULE INVOLVED

Federal Rules of Criminal Procedure:

RULE 41. SEARCH AND SEIZURE.

* * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist

or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * *

STATEMENT

On March 3, 1953, petitioner filed a "Petition to Suppress Evidence" in the United States District Court for the Eastern District of Michigan, alleging that the United States Attorney was about to present evidence to the grand jury in order to have him indicted "for violation of the internal revenue laws in the filing of income tax returns * * * for the years 1946 and 1947" (R. 5a); and that such evidence (consisting of two books) had been obtained from petitioner in violation of his rights under the Fifth Amendment, the books having been delivered to the Treasury agents investigating petitioner's income after petitioner's attorney had been advised by the then Collector of Internal Revenue that "the Government did not consider Petitioner's case an appropriate one for prosecution and that Petitioner would be safe in turning over his books" (R. 6a). The petitioner prayed for (1) an injunction restraining the United States Attorney from using the books or evidence obtained from them in any criminal prosecution of petitioner, and (2) a suppression order to prevent any use of the books, directly or indirectly, as evidence in any criminal prosecution of petitioner. (R. 7a-8a.) On March 10, 1953, the petition was dismissed for want of equity. (R. 12a-15a.) Later, on the same day, an indictment was returned against

petitioner alleging willful attempts to evade large parts of his 1946 income tax and the 1947 income taxes of himself and his wife. (R. 2a-4a.)[1]

On the petitioner's appeal, the cause was remanded to the District Court with instructions to consider the petition upon its merits. (R. 16a.) After a full hearing the District Court again denied the petition. (R. 308a-324a.) The Court of Appeals affirmed (Pet. 15-21.)

The evidence to support the denial of the petition may be briefly summarized as follows:

In December 1948 Internal Revenue Agent Krieger called petitioner on the telephone and advised him that he had been assigned to check petitioner's income tax returns for 1944, 1945 and 1946, and that he would like to see his records. Krieger met petitioner on December 13, 1948, at which time Krieger was furnished with certain records. (R. 227a-228a.) Krieger received no books at this time, and the records petitioner gave him appeared to be inadequate. (R. 229a, 230a.) On or about December 22, 1948, petitioner retained Snider, an attorney, to represent him in the matter. (R. 234a.) Krieger told Snider that he had gone over the records furnished by petitioner; that they seemed to be inadequate; and that he would need a net worth statement since he had

---

[1] The order denying the petition was a final and appealable order, and was not rendered moot by the subsequent filing of the indictment. See *Lapides* v. *United States*, 215 F. 2d 253, 254 (C.A. 2d), and cases cited therein.

no other way to determine petitioner's true income. (R. 235a-236a.) Some net worth data was supplied by Snider. (R. 238a-239a.)

In January 1949 Krieger again conferred with Snider, who stated that petitioner was anxious to clear up his tax matter and asked whether some settlement could be arrived at through the use of net worth. (R. 241a.) Krieger replied that his examination had reached the point where he "felt there was a possibility of a fraudulent reporting of income on his returns and that [he] was going to have to call a Special Agent into the case". (R. 241a.) Snider expressed the hope that petitioner would not be in any serious trouble. (R. 242a.) Later that month Special Agent Sullivan was introduced by Krieger to petitioner and to Snider as a special agent of the Intelligence Unit. (R. 244a-245a, 265a, 267a-268a, 288a.) Sullivan asked petitioner whether he had any additional records that he had not turned over to Krieger, and petitioner replied that he had none.[2] (R. 245a-246a, 288a.) Snider admitted that there was a discrepancy between reported income and the increases in net worth, and thought perhaps the tax could be determined by the net worth method. (R. 266a.) Sullivan advised Snider in petitioner's presence that the agents were in no position to accept any estimates of income and that they "were going to have to make [their] own determination in the best way possible". (R. 246a.) Petitioner, who is

---

[2] On cross-examination, petitioner testified that he knew that his books were at the hospital. (R. 193a.)

an osteopathic physician who operated a clinic and was associated with a hospital (R. 308a), told Sullivan that all of his surgical patients had been covered by hospitalization insurance. (R. 268a.) Sullivan replied that his experience in examining physicians' returns had been that only a minority of surgical patients are covered by such insurance, and that, in the absence of records, it would be necessary for the agents to secure the names and addresses from the hospital and write to the patients. Petitioner insisted that he could be of no help in securing additional records, and that the agents, if they felt it necessary, should go ahead and circularize the patients. (R. 269a.)

Early in February, 1949, the agents began to prepare extensive lists of petitioner's patients as shown by the hospital records. (R. 249a-251a.) They soon discovered that petitioner had a number of patients not covered by hospitalization insurance. (R. 269a.) In mid-February Sullivan told his supervisor, A. C. Grunewald, that petitioner had produced no books with respect to his surgical income and Sullivan felt it was necessary to write to each of the 6,000 patients. (R. 270a-271a.) Grunewald authorized the use of three or four stenographers for that purpose. (R. 271a.) On February 23, 1949, when the letters were about to be sent out, Snider called Sullivan and advised him that petitioner had some additional records. (R. 271a-272a.) Sullivan went to Snider's office and was advised there by petitioner that he "had some records that were kept at the hospital" by his secretary (R. 272a) and that he would bring them to

Snider's office the next day. On February 24, 1949, petitioner, as he had agreed, produced the two books in Snider's office. (R. 273a.) Petitioner offered them to Sullivan, but, at Sullivan's request, gave them first to Snider so that he might look them over. (R. 273a.) There was no conversation at that time relating to whether petitioner's tax case was a civil or criminal matter, nor was there ever any such conversation involving Sullivan at any time. (R. 274a.)[3]

About one year later petitioner's new attorney, Cashen, was advised by an agent working on the investigation of petitioner's case that "the case was going forward and that if [Cashen] wanted to do anything [he] had to do it within a very short time". (R. 36a.) Cashen thereupon prepared an affidavit for petitioner's signature, and petitioner signed it on February 3, 1950. (R. 33a-34a, 286a.) Petitioner alleged in this affidavit that, prior to the time he turned the books over to the agents, Special Agent Sullivan had given him repeated assurances that his case was purely civil, and that petitioner had "turned over these books and records to Agent Sullivan solely upon his promise and agreement that said investigation was not of a criminal nature, and that he had nothing to fear from any information these books might disclose". (R. 284a, 285a-286a.)[4] These allegations were totally false, and petitioner so admitted

---

[3] Internal Revenue Agent Krieger was not present when the books were turned over. (R. 252a.)

[4] This affidavit was filed with Special Agent Sullivan's supervisor, A. C. Grunewald. (R. 39a.)

on the witness stand.[5] (R. 201a-205a.) Sullivan had given no such assurances at any time. (R. 274a-276a.) Snider, who had represented petitioner at the time the books were turned over, admitted that there had been "no agreement whatever by the Agents that there would be no criminal prosecution if he gave them the books". (R. 261a.) Sullivan told Cashen, who had prepared the affidavit, that he could not understand why these charges had been made and asked for an explanation. Cashen replied, "You know, if you can't attack the merits of the case you attack the agents". (R. 276a.)

About one year after the submission of petitioner's original false affidavit, he signed a new one, dated February 27, 1951. (R. 290a.) In that document petitioner alleged that he had retained Snider on the advice of a doctor who claimed to be a friend of the then Collector of Internal Revenue, Kavanagh; that petitioner met Kavanagh, who informed him that his case was only of a civil nature (R. 287a); that petitioner admitted to Snider that he had some additional books but refused to turn them over until he had assurance that "they will not be used against me" (R. 289a); that Snider said he wanted to talk to Kavanagh; that later Snider advised petitioner that Kavanagh, after talking with Grunewald, had

---

[5] Cashen attempted to take the responsibility for this affidavit, testifying that he had secured the information from Grunewald and the Treasury agents (R. 31a-35a) because petitioner, his client, refused to tell him the circumstances under which he had turned the books over to the agents (R. 35a, 43a).

told Snider to tell petitioner "to go ahead and turn over the books, that there was not going to be any prosecution" (R. 289a); and that he turned the books over to the agents the next day, at which time "Nothing whatsoever was said about the use of the books, prosecution, voluntary surrender, etc." (R. 289a.)

At the hearing there was introduced into evidence an undated, unsworn statement purportedly signed by Kavanagh in which it was stated that Snider had asked him whether petitioner "would be safe from prosecution if the books were turned over to the agents" and that "Mr. Kavanagh was under the impression that this was a civil, not a criminal, tax case and so advised Mr. Snider". (R. 282a.) Kavanagh died before the petition to suppress evidence was filed. (Pet. 8.) Snider testified that Kavanagh had told him "as far as criminal prosecution is concerned, don't worry about that" (R. 109a), but indicated that Kavanagh's knowledge of the case consisted mainly of petitioner's version of the facts (R. 101a, 102a). Snider had admitted in an affidavit that "it is possible that [he] may have misunderstood Mr. Kavanagh." (R. 10a.) There was other testimony to the effect that Kavanagh had told Snider that "he would not guarantee that there would be no criminal prosecution" (R. 257a) and that Kavanagh had expressed his understanding that "he had no authority to promise any immunity in a criminal case" (R. 27a.)

ARGUMENT

Petitioner's sole contention, that his petition to suppress evidence (filed before the institution of any criminal proceedings against him) should have been granted, is wholly without merit. His argument is based mainly on his own testimony, which the District Court must be deemed to have rejected. That court found, *inter alia*, the facts to be as follows (R. 321a-323a):

> Much of petitioner's testimony given on direct examination failed to withstand the test of cross-examination. There was ample evidence on which to base a conclusion that he was the trapper rather than the trapped. He reposed but little confidence in his attorneys and often kept them in complete ignorance of the true facts. On the basis of only such facts as he chose to disclose, and therefore on a hypothetical state of facts, he invited opinions from government officials, only to claim reliance on the correctness of such opinions as applied to a radically different factual situation.
>
> With the prospect of circularization of his patients, questioning of his employees, and disclosures which these could produce, he had little to lose and hoped he had something to gain by surrendering the books—such as settlement of his tax liability and possible forestalling of criminal prosecution thereby.
>
> Surrender of the two books by petitioner was voluntary, uninduced by any threats, promises, or assurances, made by him directly by any agent or official of the Bureau of Internal Revenue.
> • • •

There were no promises or assurances of any kind given to petitioner through his attorney, by any responsible person in the Bureau of Internal Revenue, to compel surrender of the books. Even if any of the statements to Snider could be so construed, they were unauthorized and Kavanagh's lack of authority was well known to petitioner's counsel.

At the time the books were surrendered no criminal prosecution was, in fact, contemplated, and any inquiries which were made of government officials as to the status of the case were truthful and not misleading. Petitioner had superior knowledge of what the investigation would in the end produce, when the investigation was still in the "embryonic stages", and he had reason to believe that it would uncover substantially the same information which the withheld records contained, but by a more painful method, both to him and to the investigators. He was aided by the assistance of counsel at every step and if he was not fully advised, he alone was responsible for the situation by his failure to submit truthful information to counsel, and must bear the consequences. He cannot attribute it to any acts on the part of government officials.

These findings of fact are amply supported by the record (*supra*, pp. 4-9).[8] It is apparent that no violation of petitioner's privilege against self-incrimination is involved.

Even assuming, *arguendo*, that there would be a

[8] It should be noted that the Government called three witnesses at the hearing, all of them Treasury agents, and that the defense declined to cross-examine any of them. (R. 252a, 262a, 277a.)

violation of petitioner's privilege against self-incrimination, if the two books were admitted in evidence at his trial, the denial of his pre-indictment petition to supress would nevertheless have been proper. The only authorization for a pre-indictment proceeding to suppress evidence is found in Rule 41(e) of the Federal Rules of Criminal Procedure, *supra*, pp. 2-3. Under that rule, pre-indictment petitions to suppress are authorized only in cases where the evidence comes into the possession of the Government as the result of an unlawful search and seizure forbidden by the Fourth Amendment. *Benes* v. *Canary*, 224 F. 2d 470 (C.A. 6th), certiorari denied, 350 U.S. 913; *Centracchio* v. *Garrity*, 198 F. 2d 382 (C.A. 1st), certiorari denied, 344 U.S. 866; see also *Chieftain Pontiac Corp.* v. *Julian*, 209 F. 2d 657, 659 (C.A. 1st). The only case we can find to the contrary is *In re Fried*, 161 F. 2d 453 (C.A. 2d), certiorari granted, 331 U.S. 804, certiorari dismissed, 332 U.S. 807. In that case the Second Circuit, by a divided court, held that Rule 41(e) was applicable to a confession obtained by a combination of threats of physical violence and third degree police methods, a far cry from the factual situation in the case at bar.[7]

---

[7] Petitioner asserts no conflict between the *Fried* case and the other cases cited above. He contends, however, that the *Centracchio* and *Benes* cases, *supra*, are in conflict with *United States* v. *Shotwell Manufacturing Co.*, 225 F. 2d 394 (C.A. 7th), certiorari granted (limited to issues raised in a motion to remand) 352 U.S. 997. As to this, we need only point out that the *Shotwell* case did not involve a pre-indictment proceeding.

Finally, it should be pointed out that petitioner errs in the contention (Pet. 10) that the affirmance by the Court of Appeals "presumably renders such issue *res adjudicata* and precludes a later proper consideration of the evidence relative thereto". The order of the District Court states: "The petition to suppress evidence is denied but without prejudice as to any issues on the competency or incompetency of evidence therein raised". (R. 324a.) And the Court of Appeals held (Pet. 19):

> There is no attempt in the present case to deprive the appellant of any rights which he might have to prevent the use of evidence complained of in the prosecution of the pending indictment against him. It is a question of procedure rather than one of substantive law. When and in what manner the objection to its use is to be made is the question involved.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

OCTOBER 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 445190 5M5